

Charles Cajetan Count Leslie, and Antonius } Appellants.
Count Leslie - - - - - }

Peter Leslie Grant, and his Tutor in Litem Respondents.

The Respondents CASE.

WALTER Count Leslie, a younger Brother of the Family of Balquhain in Scotland, became possessed of a very large Estate in Germany, and having no Issue, he settled the same upon the Male Issue of his elder Brother Alexander Leslie of Balquhain.

James, the eldest Son of the said Alexander, accordingly succeeded to the German Honour and Estate of his Uncle Count Walter; and Patrick, the second Son, took his Father's Estate of Balquhain, by Virtue of a particular Settlement thereof.

James, who had succeeded to the German Estate and Title of Count, had no Issue. His younger Brother Patrick, who had got the Scotch Estate of Balquhain, had two Sons, James, by a first Wife, and George, by a second Wife, and two Daughters; Margery, who married Leslie of Pitcapel, and Anna Francisca, who married John Grant of Ballindalloch.

8th Novr. 1692.
Entail of the Estate of Balquhain made by Patrick Leslie.

Patrick of Balquhain, having the near Prospect of succeeding to the German Honours and Estate, by Default of Issue of his elder Brother Count James, and being desirous to keep the German and Scotch Estates separate, executed an Entail of the Estate of Balquhain, settling the same upon George his second Son, (of the second Marriage) and the Heirs Male of his Body, with Remainder to the Heirs Male of his own Body by any subsequent Marriage, and only calls his eldest Son James, and the Heirs Male of his Body, (who were to succeed to the German Estate and Honour) to the succession of the Estate of Balquhain after those Remainders. There are several other Remainders over in this Entail, and it contains a Proviso, that the Estate of Balquhain should always be kept distinct and separate from the Estate in Germany; and that upon one Person succeeding to both the Estates, the Scotch Estate should devolve upon the subsequent Heirs of Entail in the Order therein mentioned, and that the Heir intitled to take the Scotch Estate, under the devolving Clause, should have a Power to redeem the same from the Person in Possession thereof, by Payment of 10 Merks Scots. It further contains a Clause, whereby the Granter settles all such Lands and Hereditaments as he should afterwards acquire or succeed to in Scotland, and which he should not otherwise dispose of, in his Life-time, upon the said George Leslie, with Remainders to the other Heirs mentioned in the Entail.

Upon this Entail, which reserves to the Granter a Power to alter, a Charter past under the Great Seal, on the 9th of March, 1694, and Infeftment was taken thereon on the 3d of September in the same Year. And Patrick, the Maker of the Entail, having afterwards purchased the Lands of Inch, took the Titles and Conveyance thereof to the Series of Heirs established by the said Entail, or such as he should thereafter appoint.

13th July 1700.
A new Entail by way of Codicil to the former.

In Pursuance of the Power of altering the Entail, Patrick, after his Succession to the German Honours and Estate, by the Death of his elder Brother, executed a new Entail by way of Codicil to the former one of 1692, which is thereby confirmed with a Variation in the Line of Heirs; and by this new Entail he settles the Estate of Balquhain, and all other Lands he then had, or thereafter might acquire, upon George Leslie his second Son, (who was first Taker under the former Entail) and the Heirs Male of his Body; Remainder to the Heirs Male of his (the Maker's) own Body by any other Marriage, (still passing over his eldest Son James, who was to inherit the German Estate) and upon Failure of them he settles the Estate upon his Grandson Charles Cajetan Count Leslie, the second Son of his eldest Son James, procreate between him and Berne Princess of Lichtenstein, in Tail Male, and then upon any other second Son of the said James the eldest Son in Tail Male—And in Default of younger Sons of James, (the Maker's eldest Son) the Succession is settled upon any second Son of the Maker's Grandson Joseph Patrick Count Leslie, (the eldest Son of James the Maker's eldest Son) in Tail Male—Remainder to any second Son of Francis Jacob Count Leslie, only Son of Alexander deceased Brother to the Maker, in Tail Male—Remainder to any second Son of the eldest Son of the said Francis Jacob in Tail Male—Remainder to James Leslie eldest Son of Alexander Leslie of Pitcapel, and Margery his Wife, the Maker's own eldest Daughter in Tail Male—Remainder to John Grant (the Respondent's Father) eldest lawful Son of John Grant of Ballindalloch, and of Anna Francisca, the Maker's own second Daughter in Tail Male—Remainder to James Grant second lawful Son of John Grant of Ballindalloch; and the said Anna Francisca in Tail Male; with several Remainders over, under the usual Prohibitions against the aliening the Estate, or contracting Debt.

Remainder under which the Respondent claims.

Charles

George the second Son of Patrick took the Estate of Balquhain. On Ernest's dying without Issue a Competition arose about the Right of Succession.

Charles Cajetan Count Leslie, second Son of *James*, the eldest Son of *Patrick* of *Balquhain*, the Maker of that Entail, succeeded to the *German* Estate and Honour by the Failure of the elder Branches; and *George*, the second Son of the said *Patrick* of *Balquhain*, enjoyed the Estate of *Balquhain* by Virtue of the aforesaid Settlements thereof; and was succeeded therein by two Sons successively, viz. *James*, who died without making up Titles to the Estate, and *Ernest*, who in the Year 1739 served himself Heir of Entail, and took out a Charter in his own Favour upon the Entail 1700. But *Ernest* afterwards also dying without Issue, a Competition arose about the Right of Succession to the Estate of *Balquhain*. The Ground of the Competition stood thus.

By the Settlement 1700, the Estate went directly to *Charles Cajetan Count Leslie*, who was nominatim called thereto in the Event which existed by *Ernest* of *Balquhain*'s dying without Issue; but he having come to the *German* Honour and Estate, as the eldest Branch, was, by the Provision of the Entail of *Balquhain*, disabled from holding both Estates, and his Sons, the Counts *Leopoldus* and *Antonius*, and *James Leslie* of *Pitcairney*, severally claimed the Estate, as being the Persons intitled to succeed thereto upon the Disability of Count *Charles Cajetan* under the said Settlement: And the Issue of that Dispute was, that in pursuance of the Directions of a Decree of the House of Lords, upon Appeals brought by the

29th June, 1742. Decree of the Court of Session in Execution of the Judgment of the House of Lords upon this Competition.

several contending Parties, "It was found and declared, by a Judgment of the Court of Session, that *Antonius Count Leslie* (the Appellant) second Son to *Charles Cajetan Count Leslie*, was the next Heir of Entail, to whom the Estate of *Balquhain*, in the Event which had happened, devolved, according to the true Intent and Meaning of the Deeds of Entail mentioned in the said Decree or Judgment; and the Court ordered, that the said *Charles Cajetan Count Leslie* should denude himself of the Estate of *Balquhain* in favours of the said *Antonius Count Leslie*: And it was further declared, that the same should be redeemable by the said *Antonius* from the said *Charles Cajetan Count Leslie*, and his eldest Son, or his Heirs Male, for Payment of the Sum of ten Merks Scots, in Terms of the said Entail."

In consequence of this Judgment Count *Antonius*, having expedite a Service as Heir under the two Entails, completed his Title to the Estate, by taking a Decree of Adjudication thereof against his Father Count *Charles Cajetan*, upon which Charter and Infeoffment followed.

A Question afterwards arose between Count *Antonius*, now of *Balquhain*, and *James Gordon* of *Cowbairdie*, a Brother Uterine of *Ernest*, last of *Balquhain*, touching certain Lands of the later Purchases of Count *Patrick* of *Balquhain*, which had been annexed by him to the Estate. Those Lands had been disposed by the said *Ernest* to the said *James Gordon*, and were reclaimed by Count *Antonius*, as being disposed contrary to the Prohibitions of the Entail. And in the Course of that Cause, it having been admitted on the Part of Count *Antonius* the Plaintiff, that he was an Alien, born without the Allegiance of his Majesty, the Court of Session pronounced a Judgment, Finding, "That, by the Common Law of Scot-

Suit brought by Count *Antonius* against *Gordon* of *Cowbairdie* to recover the Lands purchased after the Execution of the Entail and disposed to him by *Ernest*. 1 June 1749. Interlocutor finding Count *Antonius* an Alien, and that therefore he could not succeed.

land, an Alien, not naturalized, could not succeed to any Heretage in that Country, and that Count *Antonius* (the Appellant) was an Alien, and therefore had no Right to carry on that Action for the Recovery of a Land Estate;" upon which Count *Antonius* desisted from his Claim of the Lands disposed to Mr. *Gordon*, but he continued to possess the proper Estate of *Balquhain*.

The Respondent *Peter Leslie Grant* (who claims under the Remainder in favour of the Issue of *Anna Francisca Leslie*, the youngest Daughter of Count *Patrick* of *Balquhain*) some time ago entered his Claim to the Estate of *Balquhain*, as the nearest Protestant Heir not an Alien. His Claim is founded on the Act of the Parliament of Scotland in the Year 1700, for preventing the Growth of Popery, which disables Papists to succeed or inherit, and transfers the Right of Succession to the next Protestant Heir; and on the Common Law of Scotland, as declared by the above Judgment in the Cause between the Appellant Count *Antonius* and *James Gordon*, whereby it was found and adjudged that Aliens cannot inherit; and on the Fact, that the Appellant, and all the Persons standing before the Respondent, in the Order of Succession, by the Settlements of the Estate of *Balquhain* before recited, were either Papists, or Aliens, or both.

Sept. 1756. Respondents Action of Exhibition, Reduction and Declarator.

He, accordingly, in September 1756, brought an Action of Exhibition, Reduction and Declarator, in the Court of Session, charging, That the Appellants, and all the other Persons, called to the Succession before him, were either Papists or Aliens, and that he was the nearest lawful Heir of Tailzie capable to succeed to the said Estate, and that Count *Charles Cajetan* stood bound to denude in favour of the Respondent under the Provision in the above Settlement, and therefore concluding for Exhibition and Delivery of the Writings and Title-Deeds of the Estate, and for a Reduction and Voidance of the Decree of Declarator in favour of Count *Antonius* in 1742, and of his Service, Adjudication, and Charter, and Infeoffment thereon, on Account of the Person, or Persons, in whose Favour the same were conceived, being an Alien or Aliens, and of the Popish Religion, or under either of these Incapacities; and that the Respondent is now the nearest lawful Heir of Tailzie capable to succeed to the said Estate of *Balquhain*; and that thereby he is well entitled to be served Heir therein to *Ernest Leslie*, (the Person who died last vest and seized in the Fee of the said Estate) under the Deeds of Tailzie, and the Laws before recited; or, at least, that Count *Charles Cajetan Leslie*, upon whom the Succession, in both the *German* and *Scotch* Estates, had devolved, ought to be decreed to denude in favour of the Respondent.

19th April, 1757. Respondent sues out his Brieve for having him served and retoured nearest lawful Heir to the Estate of *Balquhain*.

On the 18th of April 1757, the Respondent also sued out of his Majesty's Chancery, the King's Brieve or Writ of Mortancestry, for having him served and retoured nearest and lawful Heir of the reformed Religion, to the above mentioned *Ernest Leslie* of *Balquhain*, his Cousin, in order to make up a Title to the Estate as Heir in special to the said *Ernest*.

There were several Proceedings had upon the Respondent's Breive; in the Course of which, the Appellants having strenuously opposed the Respondent's Service in every Step of the Proceedings, ten several Interlocutors were pronounced in favour of the Respondent.

In the Action of Exhibition, Reduction, and Declarator, numberless Objections and Defences were made on the Part of the Appellant, merely calculated to delay, and avoid entering on the Merits of the Cause, inasmuch that there were no less than thirteen Interlocutors on preliminary Points. This Method of proceeding made the Respondent very eager to insist for Judgment, on the material Points in the Cause;

(3)

Cause; and his Council having insisted, that as the Court had by their Interlocutor of the 9th of June, 1749, in the Cause against Mr. Gordon of Cowbardie, found, that by the common Law of Scotland, an Alien could not succeed to any Heretage in that Country, and that Count Antonius was an Alien, and had therefore no Right to carry on that Action; no further Evidence was necessary of the Appellants being Aliens, and that thereupon, and upon the Notoriety of their being Aliens, they ought to be held so, unless they proved the contrary. The Court upon the Argument of this Point, gave a Judgment, finding it presumed, that the said Antonius Count Leslie was an Alien, to which Judgment they adhered, upon a reclaiming Petition by the Appellants, with this Variation, that they found it presumed, that Antonius Count Leslie, and Count Charles Cajetan Leslie his Father, were both born in foreign Parts without the Allegiance of his Majesty.

Jan. 27th, 1758.
Feb. 28th, 1758.

1758.
Two Appeals
brought by the
present Appel-
lants.
6th April, 1758.
Judgments upon
the said Appeals.

The Appellants thought proper in the last Session of Parliament to bring two different Appeals—the one against all the Interlocutors on the Respondent's Brieve, and the other against all the Interlocutors in the Respondent's Suit of Declarator. And on the hearing of the said Appeals, this most honourable House was pleased to order and adjudge on the Appeal in the Suit of Declarator, that the Interlocutor of the 27th January and 28th of February 1758 (by which the Presumption was established against the Appellant) should be reversed; and that both Parties should be at Liberty to make such Proofs as were competent to them by Law, and that it should be remitted to the Lord Ordinary to proceed accordingly; and that all the other Interlocutors complained of in the said Appeal should be affirmed.—And on the Appeal in the Service of the Respondent to dismiss the same; and to affirm the several Interlocutors thereby complained of.

The Cause having gone back to the Court of Session, sundry Proceedings were had both in the Process of Brieves and Suit of Declarator, in which the Appellant continued to give all possible Obstruction to the Respondents being let into the Proof directed by the Decree in the former Appeals.

In the Process of Brieves it was objected by the Appellant that there could be no further Proceeding therein, as the Brieve was for serving the Respondent Protestant Heir to the deceased Ernest Leslie, which could not now be done, the Appellant having purged himself of Popery, by taking the Formula as prescribed by Law; and Exception was also taken to the Respondent's being allowed Access to a Proof which had been taken by Commission, after the Judgment on the former Appeals upon sundry Objections in Point of Form, which were extremely frivolous.—And these Questions having been reported to the whole Lords by Lord Prestongrange, one of the Lords Assessors to the Macers, before whom the Process of Service proceeds, the Lords pronounced the following Interlocutor.

20th December,
1758.
Interlocutor of
the whole Lords
in the Process of
Brieves.
Second appealed
from.

“ Upon Report of the Lord Prestongrange, the Lords find that the Brieve as nearest Protestant Heir presently depending before the Macers, at the Instance of Peter Leslie Grant still subsists, notwithstanding the Certificate produced for Anthony Leslie of Balquhain, of his having taken the Formula, and repel the Objection made to the Commission issued by the Clerk to the said Service, and ordain the Seals to be taken off the Proof following upon the said Commission to the Effect the Purchaser of the Brieve may have access thereto.”

The Action of Reduction and Declarator having been also proceeded in before the Lord Ordinary, to the Intent that the Judgment on the Appeal might be carried into Execution, his Lordship in Pursuance of the said Judgment, pronounced the following Interlocutor:

8th Dec. 1758.
Interlocutor of
Lord Ordinary.
First Interlocutor
appealed from.

“ Before Answer, allows the Pursuer (Respondent) to prove *prout de jure* that Charles Cajetan Count Leslie, Antonius Count Leslie, and the hail other Defenders called (except Captain John Grant the Pursuer's (Respondent's) Father were born in foreign Parts out-with his Majesty's Allegiance; as also that the said Charles Cajetan Count Leslie, and the hail other Persons Defenders, called in this Process (excepting Antonius Count Leslie) are Papists and profess the Romish Religion, and all other Facts and Circumstances relative thereto, and allows the Defenders a conjunct Probation thereanent, if they shall think fit. And grants Commission to both Parties for proving to the Effect foresaid; and that at Luchtemberg, Chamb, Ratibon, Gratz, Gorlitz, Freitberg, Landsbut, Schweidnitz, Erfurd, Leewarden, Vienna, Venice, Hague, Rotterdam, Amsterdam, Gertrudenberg, Ulesingue alias Flushing, Trieste, London, Dublin, Edinburgh, Aberdeen, Old Aberdeen, Mill of Pitcaple, Kimmundy, Elgin and Irvine; and that any lawful Day or Days, betwixt and the Day of next to come, each Party before extract naming Commissioners to the other for taking their Proof at the respective Places abovenamed; and in case they fail to name, or the Commissioners named failing to accept or attend, then to the Governors, Deputy Governors, or any of the civil Judges in the several Towns in Germany, Holland, or Netherlands, where this Commission may be executed; and to any of the Councilors of the City of Venice, failing the Acceptance or Attendance of the Commissioner or Commissioners named for taking the Proof there; and to any of his Majesty's Justices of Peace of the Cities of London and Dublin, failing the Acceptance and Attendance of the Commissioners named for taking the Proof at these Places; and to the Sheriffs, Deputies or Substitutes, or any of his Majesty's Justices of the Peace for the several Shires in Scotland where the Commission may happen to be execute, failing the Acceptance or Attendance of the Commissioners named for taking the Proof in Scotland; and each Party intimating to the other, or to their Doers at Edinburgh, the Time they are to begin to lead their respective Proofs at the Places abovementioned, Forth of Scotland; and that one Month at least before taking the said Proofs, and fourteen Days at least before leading any Proof at the Places abovenamed in Scotland: And recommends to the Commissioners accepting, and who shall be assisting in executing of the Commission in foreign Parts, to apply for and obtain all proper and necessary legal Compulsitors for making the Witnesses compare before them, as to them shall seem expedient and necessary, to be reported the Day of next to come: And grants Warrant for Letter of Diligence, at either Party's Instance, against Havers and Witnesses residing in Scotland, for comparing and deposing before the Commissioners to the same Day: But superleides extracting

"tracting Commission hereby granted for taking the Proof at any of the Places abroad, and without the Dominions of *Great-Britain*, to the 7th Day of *February* next to come, to the End the Defenders Doers may have an Opportunity to be instructed to name proper Commissioners at the several Places abroad; betwixt and which Day, if they fail to name, allows the Commission to be extracted; without Prejudice nevertheless to the Pursuer (Respondent) to take an Extract of the Commission for leading the Proof, to be adduced by him within the Dominions of *Great-Britain*, in the common and ordinary way allowed by the Forms of Court."

22d Dec. 1758.
Interlocutor of
Lord Ordinary.
Third Interlocu-
tor appealed
from.

Against this Interlocutor the Appellant applied to the Lord Ordinary by a Representation, complaining thereof in sundry Respects; particularly that the Time limited for extracting the Act and Commission being to the 7th of *February* then next, was too short. That several of the Places mentioned in the Act being under the Power of the King of *Prussia*, the Commission could not well be there executed; and the Lord Ordinary, by Interlocutor of this Date, "Prorogued the Time formerly allowed to the Defenders for naming Commissioners to take the Proof at the Places abroad, and without the Dominions of *Great Britain*, to the 21st Day of *February* next to come; and in order that no Dispute might remain anent the Intimations to be made by the Pursuer, (Respondent) of the Time he was to begin his Proof, appointed the Intimations to be made to the Defenders themselves, or to their Doers at *Edinburgh*, that is to say, any of the Defender's Lawyers, *Ronald Crawford* Writer to the Signet, and *Allen Clerk* their Agents, or that Notice be made and given to *Thomas Dundas Esq;* younger of *Fingask*, at the Shop of Messrs. *Dundas, Inglis, and Callender*, Merchants in *Edinburgh*."

16th Jan. 1759.
Interlocutor of
the Lords.
Fourth Interlocu-
tor appealed
from.
20th Jan. 1759.
Interlocutor of
the Lord Ordinary.
Fifth Interlocu-
tor appealed
from.

The Appellant and others presented a reclaiming Petition against these Interlocutors to the whole Lords, upon advising whereof this Day, they "Remitted the same to the Ordinary, with Power to do therein as he should see Cause." Whereupon his Lordship, upon the 20th of that Month, pronounced the following Interlocutor. "Having considered the former Interlocutor, with this Petition and Remit, and heard the Opinion or Advice of the Lords delivered by the Lord President, that, as Parties have no legal Title or Privilege to name or chuse Commissioners for taking each others Proof, in the present Case it appeared most expedient for avoiding some of the Inconveniencies alledged in the Petition, that there should be no Commissioners named by the Parties in this Cause: And having heard Parties Procurators thereon, the said Lord Ordinary, before Answer, allows the Pursuer to prove, *prout de jure*, that *Charles Cajetan Count Leslie*, *Antonius Count Leslie*, and the hail other Defenders (excepting Captain *John Grant*, the Pursuer's (Respondent's) Father) were born in foreign Parts, out-with his Majesty's Allegiance; and also, that the said *Charles Cajetan Count Leslie*, and the hail other Persons, Defenders, called in this Process (excepting *Antonius Count Leslie*) are Papists, and profess the *Romish* Religion, and all other Facts and Circumstances relative thereto, and allowed the Defenders a conjunct Probation thereanent if they shall think fit, and gives and grants full Power, Warrant, and Commission to both Parties for proving to the Effect aforesaid, and that at *Leuchtemberg, Chamb, Ratibon, Gratz, Gorlitz, Frieberg, Landsbut, Schweidnitz, Erfurd, Lewarden, Vienna, Venice, Trieste, Hague, Rotterdam, Amsterdam, Gertrudenberg, Uefingue*, alias *Flusbing, London, Dublin, Edinburgh, Aberdeen, Old Aberdeen, Mill of Pitcoble, Kinmundie, Elgin and Irvin*, and that any lawful Day or Days betwixt and the 24th Day of *June* next to come, the Governors, Deputy-Governors, or any one of the Magistrates or civil Judges in the several Towns or Places beyond Sea respectively above-named, where this Commission may be executed, to be Commissioners for taking the said Proofs, which Governors or Judges, who shall be applied to, by, or on Behalf of either of the Parties in this Cause, are hereby requested to accept of and execute this Commission *ex comitate*, and for the Furtherance of Justice; and to any one of the Justices of his Majesty's Peace of the Cities of *London* and *Dublin*, for taking the Proof at these Places, and to the Sheriffs, Deputes, or Substitutes, or any of his Majesty's Justices of the Peace for the several Shires in *Scotland*, where the Commission may happen to be executed, each Party intimating to the other, or to their Doers at *Edinburgh*, the Time they are to begin to lead their respective Proofs at the Places above named Forth of *Scotland*, and that six weeks at least before taking the said Proofs, and fourteen Days at least before leading any Proofs at the Places above named in *Scotland*, and recommends to the Commissioners accepting, and who shall be assisting in executing this Commission in foreign Parts, to grant or apply for and obtain all proper and necessary legal Compulsitors for making the Witnesses compear before them, as to them shall seem expedient and necessary.—To be reported the said 24th Day of *June* next to come, and grants Warrant for Letters of Diligence, at either Party's Instance, against Havers and Witnesses residing in *Scotland*, for compearing and deponing before the Commissioners to the same Day, but supercedes extracting the Commission hereby granted for taking the Proof at any of the Places abroad, and without the Dominions of *Great Britain* to the 7th Day of *February* next, without Prejudice, nevertheless, to the Pursuer (Respondent) to take an Extract of the Commission hereby granted for leading the Proof to be adduced by him within the Dominions of *Great Britain* in the common and ordinary Way allowed by the Forms of Court."

16th Feb. 1759.
Interlocutor of
the Lord Ordinary.
Sixth Interlocu-
tor appealed
from.

The Appellant preferred a fresh Representation to the Lord Ordinary, and the Cause having thereon been again heard before his Lordship, it was offered on the Part of the Respondent, in order to accommodate the Appellant, That the Respondent should leave at the General Post-Office in every one of the Places where he should lead Proofs abroad a Letter directed to the Appellants, or their Agents, containing the Names of the Judges before whom, and the Names of the Houses where such Proofs were to be led: Upon advising which Representation, with Answers thereto, and the Debate in which the aforesaid Offer was made, the Lord Ordinary, by Interlocutor of this Date, "Found that the Pursuer (Respondent) before leading his Proof at any of the Places abroad, and without the Dominions of *Great Britain*, where a Proof is appointed to be taken by the former Interlocutors, shall be obliged to make Intimation to the Defenders, or their Doers, of the Names of the Governors, Judges or Magistrates in each of these Places before whom the Proof is to be taken, and of the House or Place in each

" each of these Towns and Cities *respective*, where such Proof is to be taken, by leaving in the General Post-Office of each of these Towns or Cities a Letter directed to the Defenders *Charles Cajetan Count Leslie, Leopoldus Count Leslie, Antonius Count Leslie*, or either of them, or their Agents or Doers, containing the Name of the Governor, Judge or Magistrate, before whom the Proof is to be taken, and the House or Place in the said Town or City where the said Proof is to be taken, and which Letter is to be put in the General Post-Office of each of the Towns or Cities *respective*, where Proof is to be taken, forty-eight Hours at least before leading any Proof at these Places *respective*; and refuses the Desire of the Representation as to the haill other Points thereof in respect of the Answers, and adhered to his former Interlocutors."

The Appellant Count *Antonius Leslie*, however, preferred a Petition to the whole Lords, complaining of these Interlocutors of the Lord Ordinary, and insisted upon a Point quite new in the Cause, *viz.* that the Respondent had no Title to maintain the present Action; for, that supposing the Appellant and all the other Defenders were Aliens, and consequently incapable to take, hold, or enjoy Lands or Heretages in *Scotland*, every Advantage accruing from that Alienage belonged to the Sovereign *jure escheat*: And the Specification of this general Plea was thus; 1st, That the Appellant Count *Antonius* his Title to the Estate of *Balquhain* was not by Succession but by Purchase. 2^{dly}, That, supposing it were by Succession, the Estate would not thereby fall to the Respondent, but would belong to the Crown *jure escheat*. And, 3^{dly}, That the Crown's Right *jure escheat* does, in a more particular Manner, take Place in the Case of a Purchase; for, that supposing the Alien incapable to take or hold for his own Benefit and Advantage, he can both take and hold for Behoof of the Crown, and, until the Crown claims the Benefit of the Escheat, is Trustee for the Crown. And, therefore, prayed their Lordships to find that the Respondent had no Right, Title or Interest to maintain this Action: That the Right from the supposed Alienage belongs to the Crown, and therefore that the Crown ought at least to be made a Party to the Suit, and, in the mean Time, till that Question should be determined, to stop extracting the Acts and Commission awarded by the Lord Ordinary for taking the Proof in so many Parts both foreign and domestick.

To this Petition the Respondent put in Answers, wherein it was argued for the Respondent, That the Appellant, according to the Law of *Scotland*, took and held this Estate by Succession as an Heir of Entail, and that it had been so adjudged in the former Proceedings in this Cause, in which the Court found that the Clause of the Entail, upon which the Appellant's Right to the Estate was founded, imported a Devolution of Succession; which Judgment was one of those affirmed upon the former Appeal---That, by the Law of *Scotland*, in the Case of Alienage, the next in Degree of Propinquity is the *legitimus Haeres* intitled to be served upon the Brieve of Mortancestry.

8th Mar. 1759.
Interlocutor of
the whole Lords.
Seventh Interlo-
cutor appealed
from.

" The Lords having advised this Petition with the Answers, adhered to the Lord Ordinary's Interlocutor, and refused the Desire of the Petition, and allowed the Act to be extracted."

The Appellants have thought proper to bring an Appeal, complaining of the several Interlocutors of the 8th, 20th, and 22d December 1758, 16th and 20th January 1759, 16th February 1759, and 8th March 1759; but the Respondent humbly apprehends that the said Interlocutors are agreeable to Law and Justice, and therefore hopes the same will be affirmed, and the Appeal dismissed with Costs for the following among other

R E A S O N S:

- I. As to the Interlocutor in the Service.
The Respondent's Brieve is for serving him nearest *lawful* Heir of the reformed Religion, and the Appellant's taking the Formula, tho' it purged him of *Popery*, did not determine the other Point which was the Object of Enquiry, under the Brieve, *viz.* Whether he or the Respondent was the nearest *lawful* Heir, both being supposed Protestants---And as to the other Objection against opening the Proof, it was frivolous to the last Degree, and was so held by the Court below, who are best Judges as to the Forms of their own Proceedings.
 - II. As to the Interlocutors in the Declaration:
By the Law of *Scotland* an Alien is incapable to take or hold a Land-Estate, and, upon a Succession opening to him, the Estate goes to the next in Blood, as the *propinquier Haeres*, who is *legitimus*, the Enquiry directed by the King's Brieve being *qui est legitimus & propinquier Haeres*.
 - III. The Interlocutors, complained of by the present Appeal, were pronounced in obedience to the Judgment of the House of Lords, ordering, "*That both Parties should be at Liberty to make such Proofs as were competent to them by Law.*" And the Spirit and Intention of the Appellant's whole Proceedings, is evidently to tire out the Respondent by the Expence of prosecuting his just Right, while the Appellant maintains the Opposition by Means of the Rents and Profits of the Estate, in Perception whereof he expects to continue so long as he can stave off a Determination of the Cause.
- Objection.* The Appellants Title is not by Succession or Descent, but by Purchase, *viz.* by the Redemption from his Father Count *Charles Cajetan*, in Pursuance of the Power in the Entail---And, supposing the Law to be, that an Alien cannot succeed, he may purchase and take for the Benefit of the Crown.
- Ans.* There is no such Distinction known in the Law of *Scotland* between the Case of Purchase and Succession.---But if there were, the Appellant's Right is by Succession, only as an Heir of Entail; the Clause of the Entail alluded to importing a Devolution of Succession, as has already been adjudged by an Interlocutor of the Court of Session, which was affirmed on the last Appeal.

C. YORKE.

R. MACKINTOSH.

the wind and clouds
seventy fathoms
water appeared
black.

The Respondent's CASE
 As it passed at the Bar of the House of Lords on
 the 21st Day of May 1759
 By JAMES 21. May 1759
 Ordered and Adjourned that so much
 of the Petition: Complained of as grants
 Consistency for a direct the Examination of
 Witnesses at home? Places particularly
 mentioned in the Petition: be reviewed,
 and that the Petition: in all other
 respects be and become as heretofore
 approved: And it is further Ordered that
 the Examination of Witnesses be had at
 such Places in which either of the Parties
 shall lay before the Court of Session upon
 Oath reasonable Grounds to believe that
 material Witnesses may be produced who
 the Masters in Session between the Parties
 and that the Court of Session do give all
 the proper Directions for carrying this.